IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 95 OF 2005

Behnaz Nariman Kolah ..Petitioner

Vs.

Sorabji Hormusji Commissariat
and ors. ..Respondents

Mr. V.S. Paradkar for Petitioner.
Mr. N. Janardhan i/by M/s. Narayanan & Narayanan for Respondents.

CORAM: B.H. MARLAPALLE, J.

Date : July 19, 2005.

P.C.:

1. Heard Mr. Paradkar the learned counsel for the petitioner and Mr. Janardhan i/by Narayan & Narayanan the learned counsel for the respondents.

2. The petitioner is aggrieved by the order of eviction passed by the competent authority for Konkan Division under the Bombay Rents, Hotel and Lodging House Rates Control Act (Bombay Rent Act for short) in Application No.53 of 1998 directing the present petitioner to vacate and hand over peaceful possession of the suit premises i.e. Flat No.5, First Floor,

Banoobai Commissariat Trust Charity Building, 524, Adenwalla Road, Matunga, Bombay 400 019 to the respondent within 10 days from the date of the order. The petitioner was further directed to pay Rs.100/- p.m. towards damages from the date of expiry of leave and license agreement period till the petitioner actual hands over the vacant possession of the suit premises. At the out set it needs to be noted that during last two years or so the petitioner has neither vacated the premises nor has placed any proof on record that the amount of damages, as directed, has been paid to the respondent or deposited with the court below.

3. There is no dispute that the suit premises came to be occupied by the petitioner pursuant to a written agreement of leave and license executed on 1/12/1994 wherein it was stipulated that the license period would be 11 months or till the date of demise of one of the parents of the licensee i.e. Mr.Ratan Mehta and Mrs. Khorshed Ratan Mehta, whichever is earlier. The compensation agreed was Rs.50/- p.m. It was further agreed that on the expiry of the period of

agreement or on the demise of one of the parents (whichever is earlier), the licensee shall remove herself, her servants, agents and family members along with belonging and hand over the premises to the Trustees. This license period expired on 31st October, 1995 and in view of the request made by the licensee it was extended on two different occasions for 11 months each time i.e. from 1/11/1995 to 30/9/1996 and from 1/10/1996 to 11/8/1997. From 1/1/1997 the possession of the suit premises ought to have been handed over to the Trustees and on account of failure to do so, they moved before the competent authority by filing an application under Section 13A2 of the Bombay Rent Act. The licensee filed a reply on issuing process on 7/3/2001 i.e. almost after three years and denied the claim made by the applicant-Trust. She contended that there was no relationship of licensor or licensee and, in fact, it was a relationship of landlord and tenant. As per her, the agreement dated 1/12/1994 was a tenancy agreement and, therefore, the application filed under Section 13A2 of the Bombay Rent Act was not tenable. She thus prayed for dismissal of the application.

4. On behalf of the applicants-trust, applicant no.2 stepped into the witness box and the licensee examined herself in support of her case. The agreement dated 1/12/1994 was placed on record and it was proved by the testimony of applicant no.2. Letters at Exh.A3 and A4 along with the agreement were taken on record. Similarly there were eight rent receipts at Exh.4 collectiely. In her depositions she had stated that the licensee was given the suit premises on temporary basis, the suit premises were owned by Banoobai Commissariat Trust and the taxes of the suit premises were paid by the said Trust. Tax payment receipts were also placed on record. The agreement specifically stated that it was for leave and license and it would be conclusive evidence of the facts stated therein. Section 13A2(3)(b) of the Bombay Rent Act also states that an agreement of license shall be conclusive evidence of the facts stated therein.

5. The licensee in her depositions confirmed the terms of the agreement and stated that she was

residing in the premises since 1/12/1994 continuously and was paying Rs.50/- p.m. to the landlord. She produced in all 11 receipts. She had denied ownership of the applicants but admitted that they are the Trustees of the said Trust, which owns the suit premises.

6. The Trial Court on assessment of the evidence adduced by both the parties held that the applicants are the owners of the suit premises, the application under Section 13A2 of the Bombay Rent Act 1947 was maintainable and that the applicants were entitled for vacant possession of the suit premises. The competent authority held that the respondent-present petitioner was not a tenant of the suit premises. It was also noted that the petitioner-respondent had furnished an undertaking in writing in October 1994 that she would vacate and hand over the suit premises to the Trustees after the demise of any of her parents as she would have to join other surviving parent and will stay with such parent. The agreement terms also indicated that the licensee was liable to pay damages at double the rate of the license fee if she failed to vacate

the premises and hand over the possession to the Trustees. The terms of the agreement were considered by the competent authority and the contention that the present petitioner-respondent was the tenant came to be discarded.

7. The learned counsel for the licensee referred to the decision of the Supreme Court in the case of Associated Hotels of India Ltd. vs. R.N. Kapoor reported in **AIR 1959 SC 1262** as well as the decision of this Court in the case of Sohanlal Narayandas vs. Laxmidas R. Gadit reported in **68 BLR 400**. In the case of Associated Hotels of India Subba Rao, J. while recording his individual opinion laid down the following propositions to distinguish the difference between a license and a lease:

> (a) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;
>
> (b) the real test is the intention of the parties - whether they intended to create a

lease or a licence;

(c) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property of which the legal possession continues with the owner, it is a licence; and

(d) if under the document a party gets exclusive possession of the property, 'prima facie', he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

Section 52 of the Indian Easements Act defines the term "License" as under:

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immoveable property of the grantor, something

> which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

7A. In the case of Sohanlal Narayandas (Supra), this Court again considered the difference between a lease and a licence and held that the intention of the parties is of paramount importance in deciding whether a transaction between the parties was a lease or a licence and further held that the said intention must relate to the elements which constitute a lease or a licence respectively. Thus one of the requirements of a lease is that it must consist of a transfer of right to enjoy immoveable property and such a transfer necessarily implies that grant of the right to exclusive possession of immoveable property by the transferor to the transferee. The intention of the parties is also relevant in deciding whether the other conditions of the lease have been fulfilled. This

court further observed that even where exclusive possession of immoveable property was transferred for a certain period, the transaction might amount to a licence and not a lease where the dominant consideration was not the price which the transferee was to pay for the use and enjoyment of the property. Exclusive possession of immoveable property for a specified period may also be granted to a person out of sympathy and not in consideration of the price that might be paid by him and in such cases also the transfer may amount to a licence and not a lease. It is only where the terms of a transaction are capable of being construed as the terms of a lease as well as those of a licence that the assertion of the parties that they intend to create a lease or a licence as the case may be would be a material consideration.

8. The finding recorded by the competent authority on the basis of the terms of the agreement dated 1/12/1994 is that it was a licence and not a lease. The contents therein indicated that the parties had agreed to a relationship of licensor and licensee and the suit premises were granted to the

licensee for a specific reason that she wanted to stay separately for a temporary period and wanted to join one of the surviving parents at her home on the demise of the other parent or within a period of 11 months whichever was earlier. The taxes of the suit premises were paid by the licensor and the licensee was granted permission to use the premises for a fixed period. The view taken by the competent authority cannot be termed as patently erroneous and certainly it is a possible view. Therefore, the challenge to the said order is devoid of merits.

9. Resultantly, this revision application fails and the same is hereby rejected summarily.

10. The learned counsel for the petitioner states that the petitioner may be given some time to vacate the suit premises on the basis of her undertaking to be furnished with the Registry of this Court. If such an undertaking is furnished within a period of two weeks from today, the petitioner shall vacate and hand over vacant and peaceful possession of the suit premises to the respondents-Trustees by 31st August,

2005.

(B.H. Marlapalle,J.)